Supreme Court, U.S.
FILED
NOV 5 1993
OFFICE OF THE CLERK

No. 93-547

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

FRONTIER PILOTS LITIGATION
STEERING COMMITTEE

Petitioners,

v.

TEXAS AIR CORPORATION,
CONTINENTAL AIRLINES, INC.
PEOPLE EXPRESS, INC., JOHN ADAMS
and JOHN DOES 1 through 10,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

BARRY P. SIMON
SENIOR VICE PRESIDENT
AND GENERAL COUNSEL

DANIEL P. CASEY
ASSOCIATE GENERAL COUNSEL
CONTINENTAL AIRLINES, INC.
2929 ALLEN PARKWAY
HOUSTON, TEXAS 77019
(713) 834-5131

CHARLES A. SHANOR*
JON A. GEIER
PAUL, HASTINGS, JANOFSKY &
WALKER
1050 CONNECTICUT AVE., N.W.
SUITE 1200
WASHINGTON, D.C. 20036
(202) 223-9000

ATTORNEYS FOR RESPONDENT
**COUNSEL OF RECORD*

NOVEMBER 5, 1993

Balmar Legal Publishing Services, Washington, D.C., (202) 682-9800

BEST AVAILABLE COPY

QUESTION PRESENTED

1. Whether the Court of Appeals erred in affirming summary judgment for Continental where there was no genuine dispute that: (a) the Frontier pilots had previously litigated (or should have litigated) the same claims and had previously received a final adjudication on the same issues; (b) Continental did not breach the contract sued upon; and (c) as a matter of law, Continental could not be liable for expressing legal opinions about the contract where the Frontier pilots' union counsel had been given all relevant information during contract negotiations?

2. Whether the Court of Appeals erred in affirming the denial of the Petitioners' Rule 56(f) motion where the Frontier pilots admitted they did not need, nor would they demand, additional discovery?

LIST OF PARTIES

Petitioners, the Frontier Pilots Litigation Steering Committee, are an uncertified class of pilots formerly employed by Frontier Airlines, Inc.

Respondents are Continental Airlines, Inc., Texas Air Corporation (also known as Continental Airlines Holdings, Inc. and at the time the complaint was filed below the corporate parent of Continental Airlines), and People Express, Inc. ("PEI") (collectively "Continental"). PEI ceased to exist as of July 11, 1989; Continental Airlines was the successor in interest to PEI. On April 27, 1993, pursuant to a plan of reorganization confirmed by the Delaware Bankruptcy Court, *In re Continental Airlines, Inc.*, Nos. 90-932 through 90-984 (Bankr. D. Del.), Continental was restructured without a holding company and Continental Airlines Holdings, Inc. ceased to exist as an ongoing entity.[a]

RULE 29.1 STATEMENT

Continental Airlines, Inc. is the 91% owner of Continental Micronesia, Inc. It has no parent or other non-wholly owned subsidiaries.

---

[a] Although John Adams is listed in the caption of the petition as a Respondent, on March 28, 1990 the District Court entered an order dismissing Mr. Adams as a defendant for failure of service of process pursuant to Fed. R. Civ. P. 4(j).

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
LIST OF PARTIES	ii
RULE 29.1 STATEMENT	ii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	2
STATEMENT OF THE CASE	2
ARGUMENTS IN OPPOSITION TO CERTIORARI	5
CONCLUSION	8

TABLE OF AUTHORITIES

Cases	Page(s)
Former Frontier Pilot Litig. Steering Comm. v. Frontier Airlines, Inc., 117 B.R. 588 (D. Colo. 1990)	3
In re Continental Airlines, Inc., Nos. 90-932 through 90-984 (Bankr. D. Del.)	ii, 4
In re Graham, 973 F.2d 1089 (3d Cir.), *reh'g denied*, 1992 U.S. App. LEXIS 23,344 (1992)	6
In the Matter of the Seniority Integration of Continental Airlines and Former Frontier Airlines Pilots, No. 87 CV. 17810 (Colo. Dist. Ct.)	3
People Express Pilot Merger Comm. v. Texas Air Corp., 958 F.2d 364 (3d Cir.), *cert. denied*, ____ U.S. ____, 113 S. Ct. 185 (1992)	4
United States v. Athlone Indus., Inc., 746 F.2d 977 (3d Cir. 1984)	6
Walsh v. Cohen Weiss & Simon, No. 20803/89 (N.Y. County S. Ct. September 25, 1989)	3
Statutes	
28 U.S.C. § 1254(1) (1988)	2
Colo. Rev. Stat. §§ 13-22-201 *et seq.* (1987 & Supp. 1993)	3

No. 93-547

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

FRONTIER PILOTS LITIGATION
STEERING COMMITTEE

Petitioners,

v.

TEXAS AIR CORPORATION,
CONTINENTAL AIRLINES, INC.
PEOPLE EXPRESS, INC., JOHN ADAMS
and JOHN DOES 1 through 10,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent respectfully requests that this Court deny the petition for a writ of certiorari seeking review of the Judgment Order of the Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The letter opinion and judgment of the District Court, dated September 25, 1992, is unpublished (Pet. App. A). The Judgment Order of the Court of Appeals for the Third Circuit affirming the District Court's judgment, filed June 10, 1993, is unpublished (Pet. App. B), as is the July 8, 1993 order denying rehearing and rehearing en banc (Pet. App. C).

JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1) (1988).

STATEMENT OF THE CASE

On September 15, 1986, Continental entered into an agreement to acquire Frontier Airlines ("Frontier"), which was bankrupt and non-operating, and its sister airline People Express, which was operating. Pet. App. A2-A7. As part of the deal, Continental agreed to integrate the pilot seniority lists of Frontier and People Express with its own existing pilot seniority list. This was to be accomplished by separate arbitrations, pursuant to two agreements providing the terms for integration. The first was the Labor Protection Agreement ("LPA"), which guaranteed the pilots of People Express a "fair and equitable" seniority integration. *Id.* at A4-A5. The second arbitration agreement was the Job Preservation Agreement ("JPA") which provided a seniority integration for Frontier pilots, but which imposed the special requirement that an arbitrator take into account the non-operating status of Frontier. *Id.* at A5-A6. Both the LPA and JPA were submitted to the United States Department of Transportation and were part of its consideration in approving the underlying transaction. *Id.* at A3-A4.

In the negotiations which led to the JPA, the Frontier pilots were represented by skilled negotiators and experienced labor counsel. *Id.* at A23-A24. The Frontier negotiators testified that on September 15, 1986, "Continental presented the [Frontier] pilot negotiators with the first draft of the JPA, with the LPA attached behind it." *Id.* at A23. They further testified that they reviewed the LPA at that time, and discussed the LPA at a meeting with their attorney the following morning. *Id.* at A24. Thereafter, the Frontier pilots signed the JPA and their union ratified it. *Id.* at A8. Subsequently, in March 1987, during the Frontier-Continental pilot seniority arbitration, the Frontier pi-

lots placed into evidence an excerpt of Continental's submission to the DOT seeking approval of the transaction; the submission included the LPA. *Id.* at A25. After 11 days of hearings, a 57-page arbitration award was issued setting forth the Frontier pilots seniority rights at Continental (the "Nicolau award"). *Id.* at A10.

The Frontier pilots viewed the Nicolau award unfavorably, and since its issuance have repeatedly challenged the award in litigation. The first litigation took place in the Colorado state courts (the "FAL litigation") pursuant to the Colorado Uniform Arbitration Act. Colo. Rev. Stat §§ 13-22-201 *et seq.* (1987 & Supp. 1993). The Colorado district court ruled against them, and that ruling was affirmed by the Colorado Court of Appeals. *In the Matter of the Seniority Integration of Continental Airlines and Former Frontier Airlines Pilots*, No. 87 CV. 17810 (Colo. Dist. Ct.); *see* Pet. App. A9-A11.[1] The Frontier pilots then filed a petition for certiorari with the Colorado Supreme Court, where they maintained, *inter alia*, that alleged misrepresentations by Continental with respect to the LPA constituted grounds for vacating the Nicolau award. Pet. App. at A11. The Colorado Supreme Court denied the Frontier pilots' petition for certiorari. *Id.*

The Frontier pilots next intervened in litigation against Continental initiated by the former pilots of People Express (the "PEX litigation"). Judge Politan, who entered the decision below, also presided over the PEX litigation. As early as March 9, 1989, the Frontier pilots advanced to Judge Politan in the PEX

---

[1] The Frontier pilots also filed a motion in the Bankruptcy Court for the District of Colorado (where Frontier's Chapter 11 proceeding was pending) seeking to vacate the JPA on the ground that it had been fraudulently induced. That motion was denied, and that decision was affirmed by the District Court. *Former Frontier Pilot Litig. Steering Comm. v. Frontier Airlines, Inc.*, 117 B.R. 588 (D. Colo. 1990). The Frontier pilots also sued the union counsel who represented them in the JPA negotiations. *Walsh v. Cohen Weiss & Simon*, No. 20803/89 (N.Y. County S. Ct. September 25, 1989).

litigation "their argument that Continental had committed 'actionable misrepresentation and fraud' during the negotiation of the JPA by failing to advise the FAL Pilots about their supposed rights under the LPA." *Id.* at A14. Judge Politan denied the Frontier pilots' claims in the PEX litigation, and held that "the FAL pilots were not third-party beneficiaries of the LPA and that they were properly bound by their arbitration under the JPA." *Id.* at A18. That decision was affirmed *per curiam* by the Third Circuit and denied review by this Court. *People Express Pilot Merger Comm. v. Texas Air Corp.*, 958 F.2d 364 (3d Cir.), *cert. denied*, __U.S.__, 113 S. Ct. 185 (1992).

The final litigation assault by the Frontier pilots was this lawsuit, filed on September 19, 1989, which included claims of misrepresentation and breach of contract.[2] Having presided over the PEX litigation, Judge Politan was familiar with the relevant facts and "tortured history" of this litigation. Pet. App. at A2. On September 25, 1992, Judge Politan granted Continental summary judgment, holding that the Frontier pilots' claims were precluded by principles of res judicata and collateral estoppel, and that the claims failed on their merits.[3]

---

[2] The Frontier pilots failed to advise anyone about this lawsuit while they were raising similar claims in the PEX case. The Frontier pilots finally served their complaint on Continental when the District Court threatened to dismiss it. Pet. App. at A18 n.7.

After Continental filed its motion for summary judgment below, the Frontier pilots cross-moved to amend their complaint, alleging "new matter" and "additional facts." The District Court denied the pilots' motion, finding that the only new events were the completion of the People Express pilots' seniority arbitration and the affirmance of the resulting arbitration award by both the District Court and Third Circuit. Pet. App. at A19.

[3] The Frontier pilots' lawsuit was automatically stayed when Continental filed for Chapter 11 protection on December 3, 1990. *In re Continental Airlines, Inc.*, Nos. 90-932 through 90-984 (Bankr. D. Del.). On October 2, 1991, the Delaware Bankruptcy Court lifted the automatic stay to allow the case to proceed. The Frontier pilots assert that one of the findings the

ARGUMENTS IN OPPOSITION TO CERTIORARI

This case is inappropriate for consideration by this Court. Petitioners fail to proffer a single reason why this case is worthy of certiorari. Indeed, there is none. The decision below does not conflict with any decision of this Court or any other court of appeals. There is no question in this case of significance to anyone other than the parties. The writ should be denied.

Notwithstanding Petitioners failure to even suggest a reason why this Court should consider review of this case, we provide the following a summary response for the Court's convenience.

The Frontier pilots essentially complain that (1) the District Court wrongfully found that they had or could have litigated their LPA-fraud claims prior to the filing of this complaint in September 1989, Pet. at 6-10, 16-22, and (2) the District Court wrongfully denied them discovery and precluded their taking depositions to prove the status of their knowledge of that claim. *Id.* at 11-16. Neither complaint has merit.

The simple fact is that the current claims of the Frontier pilots have been litigated repeatedly, and every time the outcome has been adverse to them. The District Court correctly found the following material facts to be undisputed: (1) the Frontier pilot negotiators and their counsel were shown a copy of the LPA on September 15, 1986 and discussed the LPA both with the Continental negotiators and with their own counsel; (2) the Frontier pilots placed the LPA into evidence in March 1987

---

bankruptcy court was required to make in lifting the stay was "a probability of prevailing on the merits." Pet. at 4 n.2. When the Frontier pilots made this argument to Judge Politan in the District Court, he properly pointed out that they were wrong. Moreover, the Delaware Bankruptcy Court made no finding on the merits, but rather expressly stated, "[i]t's not for this Court to speak to the merits of the underlying action[]." (Transcript of Proceedings dated October 2, 1991 before the Honorable Helen S. Balick, United States Bankruptcy Judge at 161).

during the Frontier-Continental seniority integration arbitration; (3) the Frontier pilots closely monitored the PEX litigation, filed on April 1, 1987, where the existence of the LPA and its meaning was the cornerstone of the People Express pilots' claims, and (4) the Frontier pilots had expressly raised their allegation that Continental had fraudulently misrepresented their rights under the LPA in both the FAL and PEX litigation.[4] Based upon these facts and under applicable Third Circuit law,[5] the courts below

[4] Continental's motion for summary judgment was based upon the Frontier pilots' own words and prior rulings against them. The exhibits to the motion were: the testimony of the Frontier pilots and their counsel in related proceedings; the Frontier pilots' legal briefs in related cases; transcripts and rulings in the related cases; affidavits and letters by Frontier pilots and their counsel in the related cases; and selected portions of the Joint Appendix from the Frontier pilots' appeal to the Third Circuit in the PEX litigation.

In their petition, the Frontier pilots attempt to demonstrate a genuine material issue of fact by pointing to the deposition testimony of their counsel during the September 1986 JPA negotiations, who testified he never saw the LPA at that time. Pet. at 8. The District Court properly concluded the Frontier pilots could not create an issue of material fact by advancing the testimony of their former lawyer whom they are suing. *See supra*, at n. 1. More significantly, the affidavit testimony of the Frontier pilots' own negotiators is that they did see the LPA on September 15, 1986 and privately counseled with their attorney as to its terms. Pet. App. at A24.

[5] *See, e.g., In re Graham*, 973 F.2d 1089 (3d Cir.), *reh'g denied*, 1992 U.S. App. LEXIS 23,344 (1992); *United States v. Athlone Indus., Inc.*, 746 F.2d 977 (3d Cir. 1984). As expressed by the Court in *Athlone*, the Third Circuit applies the doctrine of *res judicata* expansively:

> [W]e indicated a predisposition towards taking a broad view of what constitutes identity of causes of action - 'an essential similarity of the underlying events giving rise to the various legal claims.' We therefore do not adhere to any mechanical application of a single test but instead focus on the central purpose of the doctrine of res judicata. We are thus in keeping with '[t]he present trend . . . in the direction of requiring that a plaintiff present in one suit all the claims for relief that he may have arising out of the same transaction or occurrence.

could not have concluded otherwise than that the instant complaint was barred by principles of *res judicata* and collateral estoppel.[6]

The Frontier pilots' discovery complaint is more outrageous. As noted by the District Court, Petitioners' discovery request was "in direct contradiction to their representations before [the Delaware Bankruptcy Court] . . . the FAL pilots' current counsel, stated that the FAL pilots did not need any depositions and would not seek any if the automatic stay were lifted." Pet. App. at A35-36 and n.15. More significantly, based upon the undisputed facts set forth above, there was no discovery that could have saved their claims. *Id.* at A36 and n.16.

---

746 F.2d at 984, *quoting* 1B Moore, *Moore's Federal Practice* ¶ 0.410[1], at 359 (2d ed. 1983).

[6] The District Court also ruled that the Frontier pilots' claims failed on their merits. Having had the opportunity to inspect the LPA and their counsel having had an opportunity to determine its legal effects, no fraudulent misrepresentation occurred. Pet. App. at A33. Likewise, there was no breach of contract as nothing in the LPA prevented the Frontier pilots and Continental from entering into the JPA; indeed "the LPA clearly contemplated a document like the JPA." *Id.* at A35.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

Barry P. Simon
Senior Vice President
and General Counsel

Daniel P. Casey
Associate General Counsel
Continental Airlines, Inc.
2929 Allen Parkway
Houston, Texas 77019
(713) 834-5131

Charles A. Shanor*
Jon A. Geier
Paul, Hastings, Janofsky &
Walker
1050 Connecticut Ave., N.W.
Suite 1200
Washington, D.C. 20036
(202) 223-9000

Attorneys for Respondent
*Counsel of Record

November 5, 1993